Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

WH-T.V. BROADCASTING CORPORATION,
Petitioner,

v.

ZENITH ELECTRONICS CORPORATION; MOTOROLA, INC.; and GENERAL INSTRUMENT CORPORATION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether Fed. R. Evid. P. 702 and 703 require a business valuation expert to employ "the empirical toolkit of the social sciences," such as multivariate regression analysis, rather than informed judgment consistent with the level of intellectual rigor employed in his discipline to qualify as an expert.

II. Whether the admission of expert testimony under Rules 702 and 703 may be conditioned on use of the techniques described in the Federal Judicial Center's *Reference Manual on Scientific Evidence*.

PARTIES

Petitioner is WH-T.V. Broadcasting Corporation. Respondents are Zenith Electronics Corporation, Motorola, Inc., and General Instrument Corporation.

RULE 29.6 STATEMENT

WH-T.V. Broadcasting Corporation has no parent corporation, and no publicly held company owns 10% or more of WH-T.V. Broadcasting Corporation's stock.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 395 F.3d 416 (7th Cir. 2005) and is reprinted in the Appendix ("App.") at B. 2a. The Order denying the Petition for Rehearing is unreported and is reprinted at App. A 1a. The opinion of the United States District Court for the Northern District of Illinois is unpublished and is reprinted at App. F. 29a. The district court's unpublished opinions ruling on petitioner's motions for reconsideration are reprinted at App. D. 20a and App. E 21a. The opinion of the district court entering summary judgment on petitioner's claims is unreported and is reprinted at App. C 10a.

JURISDICTION

The judgment of the court of appeals was entered on January 20, 2005. App. 2a. A petition for rehearing was denied on February 8, 2005. App. 1a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

RULES INVOLVED IN THIS CASE

Federal Rules of Evidence

Rule 702. Testimony by Experts:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the

product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Rule 703. Bases of Opinion Testimony by Experts:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value substantially outweighs their prejudicial effect.

STATEMENT OF THE CASE

A. THE PARTIES' CLAIMS

Since 1987, petitioner has broadcasted analog wireless multichannel television service in Puerto Rico under licenses issued by the Federal Communications Commission. Petitioner employs a terrestrial transmission tower to broadcast its signal, a technology known as Multichannel Multipoint Distribution Service ("MMDS"). By 1998, petitioner had more than 7,000 subscribers and had operated profitably for four years.

In 1998, petitioner sought to convert its analog service into Puerto Rico's first digital television service. To convert to digital, petitioner required two complementary digital

hardware components: (1) a transmitter, known as the "head-end," which compresses, organizes and encrypts programming content (pictures, sound, program guides, *etc.*) and broadcasts the digital signal and (2) receivers, known as "set-top boxes" or "STBs," that receive and decode the signal for presentation on a television. Each subscriber must have an in-home STB to decode the signal.

Between May 1999 and July 2000, petitioner purchased 8,404 STBs from Zenith at a price of more than $2.6 Million. Under the parties' contract, Zenith was required to supply STBs that complied with published industry standards for signal configuration. Compliance with these standards allows a multichannel broadcaster to transmit a single signal that can be decoded by any standards-compliant STB. Petitioner purchased head-end equipment from a third party at a cost of approximately $3.9 million.

The STBs did not work as promised and lacked bargained-for features. The STBs re-booted on their own, locked-up when changing channels, had no parental control, closed captioning or secondary audio program capability (of critical importance for petitioner's mostly Spanish-speaking customers) and were plagued by dozens of software bugs. When Zenith's repair efforts met with continued failure, petitioner discovered that the STBs were also not compliant with the industry-standard signal configuration, eliminating petitioner's option to use STBs from other manufacturers without shutting down its service completely and converting to another system.

On June 11, 2001, Zenith sued petitioner in the Northern District of Illinois for nonpayment of the price of the last 500 STBs. Jurisdiction was predicated on 28 U.S.C. § 1332(a)(1) (diversity). Petitioner counterclaimed under the Uniform

Commercial Code and in common law fraud, alleging that the STBs were defective and lacked promised features and that Zenith misrepresented the product's specifications and features to induce the purchase. Petitioner claimed that the STBs' defects prevented it from launching its digital service and sought lost enterprise value damages of approximately $25 million.

Prior to initiating suit, Zenith sold the assets of the division which designed, marketed and manufactured the STBs to Motorola's subsidiary, GI. After the sale, former Zenith employees, newly employed by GI and Motorola, unsuccessfully continued Zenith's efforts to repair the STBs. Petitioner filed a third-party complaint against Motorola and GI alleging equitable estoppel, promissory estoppel and breach of express warranty against GI arising from Motorola/GI's unfulfilled promises to repair the STBs' defects. Petitioner sought to recover the portion of its total damages that arose after Motorola/GI acquired the division.

B. SUMMARY JUDGMENT

On cross-motions for summary judgment, the district court entered a Fed.R.Civ.P. 56(d) adjudication of specified facts that Zenith breached its contract and failed to provide STBs that met contract specifications. The district court did not enter summary judgment on petitioner's contract claim. The district court did enter summary judgment in favor of Zenith on petitioner's fraud claim, but later vacated this ruling based on newly produced evidence retrieved from Motorola/GI's computers by a data recovery expert.

On a second set of cross-motions for summary judgment, the district court entered summary judgment in favor of Motorola/GI on petitioner's equitable estoppel claims but,

based on disputed facts, left the promissory estoppel claims for trial. The district court also held that the STBs' defects were outside GI's assumed warranty obligations, but found that petitioner could recover for defects caused by GI's repair efforts.

After discovery and motion practice, petitioner was left with an adjudication that Zenith had breached its contract with petitioner and additional viable claims for breach of contract and fraud against Zenith, promissory estoppel against both Motorola and GI and negligence against GI.

C. PETITIONER'S EXPERT TESTIMONY ON DAMAGES

Petitioner offered the expert testimony of Dr. Peter Shapiro as to the business enterprise value petitioner lost through its inability to launch digital service. Shapiro is an undisputed expert with 30 years of experience in complex market assessment and business valuation for the television and telecommunication industries.

Shapiro based his damages calculation on a forecast of petitioner's lost subscriber revenues, a method recognized as the most appropriate for valuing multichannel service businesses. To forecast revenues, Shapiro determined the size of the Puerto Rico market for digital wireless multichannel services, predicted that market's growth over time and forecasted petitioner's market share between petitioner's planned launch in July 1999 and 2008, when revenue growth was expected to level off. He calculated a terminal value consistent with the standard economic assumption that a revenue stream will continue beyond the last modeled year and discounted the terminal value to present day dollars. Consistent with the widely accepted discounted cash flow method of analysis, petitioner's damages were expressed as

the difference between the forecasted value and current value of petitioner's business.

Shapiro projected petitioner's market share as a percentage of the market share of its actual competitor, DirecTV, which now has a *de facto* monopoly on wireless multichannel services in Puerto Rico. DirecTV's market penetration in Puerto Rico as of July 2002 — 150,000 subscribers — is a publicly available, verifiable fact. Shapiro projected that DirecTV's growth in Puerto Rico would continue after that date and, based upon DBS's historical U.S. growth rates, become asymptotic and approach zero after approximately nine years.

Shapiro also determined that mid-1999 Puerto Rico presented a unique opportunity for petitioner's digital service. At that time, forty percent of Puerto Rico households lacked access to wired cable and no cable service offered digital. Direct broadcast satellite ("DBS"), offered the only wireless competition and Puerto Rico had only one DBS operator, DirecTV, which had just entered the market offering only 61 channels.[1] Due to the bankruptcies of two prior providers, DBS had a poor reputation among Puerto Rican consumers, forcing DirecTV to incur high initial marketing costs. Shapiro testified that he was unaware of a market with competitive circumstances sufficiently similar to those in Puerto Rico to serve as a direct comparison. Zenith neither posited an alternative market definition nor disputed that mid-1999 presented unique circumstances.

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[1] In the mainland U.S., in contrast, 90% of households could access wired cable and two DBS operators each offered more than 150 channels.

Shapiro forecasted market share allocations by comparing the five major attributes of petitioner's and DirecTV's services: program offerings, channel capacity, antenna size, pricing and marketing and distribution. After examining the undisputed facts concerning these attributes, Shapiro found that petitioner had greater channel capacity (216 to DirecTV's 87), a smaller dish, comparable pricing and better payment terms. Shapiro acknowledged DirecTV's superiority in marketing and distribution, but opined that petitioner's other advantages would enable it to secure 10% of new subscribers.

In Shapiro's opinion, petitioner had one significant initial advantage over DirecTV: its ability to offer exclusive, highly-rated local programming. Petitioner offered all six local television stations in Puerto Rico while DirecTV offered just one. According to independent statistics, at any given time 85% (on average) of the Puerto Rico viewing audience is watching one of the three major local stations, two of which DirecTV could not provide. Research also showed that 41.3% of viewers favored local channels exclusively and an additional 31% watched local channels some times. DirecTV's Puerto Rico sales manager testified that local channels were "essential" to success in a new market and 80% of DirecTV's mainland subscribers pay extra to receive local channels. DirecTV paid $1 million for a single local channel in Puerto Rico and extensively advertised whenever it added local channels. DirecTV did not add the second major local station until April 2001 or the third until February 2002. Shapiro also noted that DirecTV's service provided Latin American weather and news rather than the U.S.-oriented news desired by most Puerto Rico viewers.

Shapiro acknowledged that petitioner needed time for digital conversion but, once conversion was complete, petitioner would be competitive. According to Shapiro,

petitioner's local channel advantage would decline as DirecTV added local stations. To translate this initial advantage into market share, Shapiro used his judgment and knowledge of the industry to allocate petitioner a temporary 10% market share advantage for each exclusive local channel but reduced petitioner's projected market share by half while it converted to digital. He then forecasted petitioner's lost market share over time as follows:

Date	Market Share	Key Factors
Aug. 1999 - Nov. 1999	15 % of new subscribers	WHTV has two exclusive local channels but is converting to digital
Dec. 1999 - Mar. 2001	30 % of new subscribers	WHTV has two exclusive local channels and is fully converted to digital
Apr, 2001 - Jan. 2002	20 % of new subscribers	WHTV has one exclusive local channel
Feb. 2002 - 2008 (end of analysis)	10 % of new subscribers	WHTV has no exclusive local channels and depends on local presence and orientation, antenna size, channel capacity and payment terms to maintain baseline

Shapiro multiplied these forecasted market shares by the anticipated number of new subscribers of wireless multichannel services over time to calculate petitioner's projected subscribers — approximately 23,000 new

subscribers (plus its original 7,000) compared to 215,000 new subscribers projected for DirecTV. He then multiplied the number of subscribers against subscription rates, accounted for subscriber churn and operating expenses, including capital costs, calculated terminal values and discounted the results to present value. A comparison of the base and revised case terminal values yielded a damage calculation between approximately $20.1 and $27.5 million.

D. District Court's Orders Excluding Expert Testimony

Motorola/GI did not oppose the admission of Shapiro's testimony and Zenith's own damages expert reviewed and approved Shapiro's market share forecast. Zenith nevertheless filed a motion *in limine* to exclude the expert testimony. The motion disputed neither Shapiro's qualifications nor his use of DCF methodology. It did not posit an alternative market definition or dispute that mid-1999 Puerto Rico presented unique circumstances. It did not contend that Shapiro should have considered different competitive factors, that he considered wrong or incomplete data or that the facts could not support the forecasted market share. Rather, Zenith focused on whether Shapiro's method of forecasting market share was tested.

The district court granted Zenith's motion in part, admitting Shapiro's opinion as to lost revenues through 2002 because Shapiro's market share allocations had been compared with market shares among an analog MMDS operator and two digital DBS operators in Mexico and found

to be "reasonable and conservative."[2] App. 34-35a. The district court excluded all testimony as to "lost profits" after 2002 as unreliable under Fed.R.Evid. 702 (even for subscribers reliably projected through 2002 as if all revenue would suddenly cease at year end) because Shapiro's post-2002 market share estimates were not tested against the experience of another MMDS operator.[3] *Id.*

Both sides sought reconsideration and the district court reversed itself, holding that all of Shapiro's market share forecast was unreliable because, notwithstanding the expert's comparison with the Mexican market, Shapiro "did not test his methodology against the experience of any other market." App. 25a. The district court rejected Shapiro's market share forecast entirely because it could not determine how Shapiro's analysis of the competitive factors translated into precise numerical market shares. App. 26a. The district court held that Shapiro's market share forecast was *ipse dixit* because it was "based upon his judgment." *Id.* Petitioner's second

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[2] Shapiro examined six year's worth of data showing competition in Mexico among an analog MMDS operator with 28 channels, multiple cable operators and two DBS providers. With less competitive offerings and more competitors than petitioner, the Mexican MMDS operator maintained an 8.6% share of the total wired and wireless Mexico multichannel market. Shapiro's forecast of a 9.6% share of the wireless Puerto Rico market for petitioner represented only a 4.2% share of the total wired and wireless Puerto Rico market.

[3] In doing so, the district court assumed Shapiro's comparison of his forecast to the Mexican market was a comparison through 2002 only. In fact, Shapiro used six years worth of data from Mexico to check his ten-year market share forecast.

motion for reconsideration and a *Daubert* hearing was summarily denied. App. 20a.

E. FINAL JUDGMENT

Having excluded Shapiro's testimony, the district court ruled that petitioner could not prove its damages and entered judgment in favor of Zenith on petitioner's fraud claim and in favor of Motorola and GI on petitioner's promissory estoppel claims. The district court held that trial could proceed on petitioner's contract claim for nominal damages only. Based on the district court's rulings on damages and while reserving the right to appeal those rulings, Zenith and petitioner stipulated that petitioner would prevail at trial on its contract claim and that nominal damages would not exceed one hundred dollars. After disposing of the remaining collateral issues, the district court entered final judgment on all claims.

F. APPEAL

The Seventh Circuit affirmed, holding that Shapiro's market share forecast was not reliable under Fed.R.Evid. 702 because it did not meet "the standards of science." In so doing, the Seventh Circuit applied an enhanced standard for expert damages testimony that compels the use of "the empirical tool kit of the social sciences" in lieu of expert judgment and requires all economic testimony to be "testable." App. 6-7a.

> Cities differ in size, average income, levels of education, availability of over-the-air TV signals and other facts that might affect the demand for [petitioner's] service. But social science has tools to isolate the effects of multiple variables and determine how they influence one dependent variable ....

> Perhaps the leading tools is the multivariate regression, which is used extensively by all social sciences. Regression analysis is common enough in litigation to earn extended treatment in the Federal Judicial Center's *Reference Manual on Scientific Evidence* (2d ed. 2000). ... Shapiro neither employed any on the methods covered in the *Reference Manual* nor explained why he hadn't.
>
> * * *
>
> On this record one cannot exclude the possibility that some problem blocked the use of multivariate regression and other statistical tools. But that would be surprising, and as proponent of the testimony WH-TV had a burden of production on the subject.

App. 6-7a.

Concluding that other markets have wireless providers using the same MMDS technology and industry-standard equipment as petitioner had contracted for but not received (although the record contains no evidence of such a market), the Seventh Circuit held that Shapiro should have conducted a multivariate regression analysis on such a market to determine the effect of independent variables, such as city "size, average income, levels of education, availability of over-the-air TV signals, and other factors that might affect the demand," on petitioner's forecasted market share.[4] *Id.*

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[4] In *dicta*, the Seventh Circuit also stated that "Shapiro might have based at least [the projection of the total market size for wireless service] on DirecTV's actual sales in other markets, but he did not do so." App. 4a. In fact, Shapiro based his market size

Zenith never argued that such a regression analysis was standard practice in Shapiro's industry and the record contained no evidence that a market with similar technological or competitive factors existed or that sufficient data from other markets was available.

The Seventh Circuit rejected the use of "expertise" and familiarity with a particular industry in forecasting market share or lost revenues. "A witness who invokes 'my expertise' rather than analytic strategies widely used by specialists is not an expert as Rule 702 defines that term." App. 7a. The court acknowledged that "experts commonly extrapolate from existing data" but held, without further explanation, that Shapiro's application of expertise and judgment amounted to nothing more than *ipse dixit*. App. 8a.

REASONS FOR GRANTING THE WRIT

The Seventh Circuit's demand that admission of expert business valuation testimony be conditioned on the use of the "empirical toolkit of the social sciences" conflicts with the uniform rule that qualifies expert testimony for admission when the judgment and experience of the witness leads to an opinion that has a "reasonable" factual basis in the record. This judicial enhancement of the requirements of Fed.R.Evid. 702 and 703 effectively imports the rigors of laboratory experiment into the realm of business judgment and will make the requirements of business valuation testimony dramatically more stringent in the Seventh Circuit than in the rest of the nation. As this Court has not yet addressed the application of its expert witness jurisprudence to economic and business

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projection on the historical experience of DBS providers in the mainland United States.

valuation testimony, this case presents a compelling opportunity to clarify the standard in circumstances that cover a broad range of applications.

A. THE SEVENTH CIRCUIT'S ELEVATED STANDARD FOR ADMISSION OF EXPERT DAMAGES TESTIMONY IS INCONSISTENT WITH ESTABLISHED LAW

Under the framework established in *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999) and *General Electric Co. v. Joiner*, 552 U.S. 136 (1997), the district court performs a "gatekeeping" role that recognizes the "liberal thrust of the Federal Rules and their general approach of relaxing the traditional barriers to opinion testimony." *Daubert*, 509 U.S. at 588. To assure that expert testimony is reliable, the Court has suggested four factors to consider: general acceptance of the expert's methodology, whether the methodology was peer reviewed, the methodology's potential or known error rate and whether the methodology was tested. *Id.* at 592-94.

"The test of reliability is 'flexible,' and Daubert's list of specific factors neither necessarily nor exclusively applies to all experts or in every case." *Kumho Tire*, 526 U.S. at 141. The overall purpose of the inquiry is to determine whether the expert "employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Id.* at 152.

When, as here, an expert's proposed testimony depends in part on his or her professional judgment and experience, "the relevant reliability concerns may focus upon [that] personal knowledge or experience." *Id.* at 150. In these circumstances, the expert's testimony should be admitted if it

has "a reliable basis in the knowledge and experience of [the relevant] discipline." Id. at 148. Thus, an opinion based on facts or data "of a type reasonably relied upon by experts in the particular field" is admissible, *Daubert,* 509 U.S. at 595, but an opinion derived from a methodology that falls "outside the range where experts might reasonably differ" is not. *Kumho Tire*, 526 U.S. at 153.

In this case the opposition neither contested the expert's knowledge or experience nor challenged his hypothesis. Zenith's own expert reviewed and approved Shapiro's forecast methodology. In upholding the district court's exclusionary decision, the Seventh Circuit elevated the standards of Rules 702 and 703 to a point at which business valuation must be tantamount to laboratory science. This is inconsistent with existing law and will have a dramatic impact on proof of damages across a broad array of commercial cases.

Under longstanding precedent, proof of the amount of damages has required only "reasonable certainty," not "mathematical exactness." As this Court noted in *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 563-64 (1931) (citations omitted):

> [W]hile the damages may not be determined by mere speculation or guess, it will be enough if the evidence show the extent of the damages as a matter of just and reasonable inference, although the result be only approximate. The wrongdoer is not entitled to complain that they cannot be measured with the exactness and precision that would be possible if the case, which he alone is responsible for making, were otherwise. ... [T]he risk of the uncertainty should be thrown upon the wrongdoer instead of upon the injured party.

Thus, "[c]ertainty in the amount [of damage] goes no further than to require a basis for a reasoned conclusion." *Palmer v. Connecticut Ry. & Lighting Co.*, 311 U.S. 544, 561 (1940). "[W]hat is required is not mathematical exactness but only a reasonable approximation. That, after all, is a matter of judgment." *Id. See also* Uniform Commercial Code § 2-715, comment 4 ("the section on liberal administration of remedies rejects any doctrine of certainty which requires almost mathematical precision in the proof of loss. Loss may be determined in any manner which is reasonable under the circumstances.").

These principles have been applied in the context of expert testimony to allow estimates of "but for" market share, future lost profits and other measures of damages when those estimates have "reasonable" evidentiary support. Under the uniform rule, when a "reasonable" evidentiary basis exists, the expert's estimation of market share or future lost profits is admissible under Fed.R.Evid. 702 and 703, regardless of the expert's "failure" to conduct a statistical analysis of the market. *See, e.g.*, *DSC Communications Corp. v. Next Level Communications*, 107 F.3d 322, 329-30 (5th Cir. 1997) (affirming admission of lost sales estimate based on plaintiff's market research and "known history of the telecommunications industry," though no statistical analysis to determine market variables most likely to affect sales was performed); *United States v. L.E. Cooke Co.*, 991 F.2d 336, 342-43 (6th Cir. 1993) (affirming admission of expert who estimated mineral rights' value on "his own lengthy experience in mine engineering," but conducted no statistical analysis to determine trends in coal prices); *Efco Corp. v. Symons Corp.*, 219 F.3d 734, 739 (8th Cir. 2000) (affirming admission of expert "extrapolation" of future lost profits from witness testimony regarding shifts in market rather than statistical analysis); *Pioneer Hi-Bred Int'l v. Holden Found.*

Seeds, Inc., 35 F.3d 1226, 1245 (8th Cir. 1994) (affirming admission of "reasonable estimate" of lost market share); *Humetrix, Inc. v. Gemplus S.C.A.*, 268 F.3d 910, 919 (9th Cir. 2001) (affirming admission of estimate of lost profits for new product based on expert's knowledge of industry and witness testimony regarding likelihood of future sales); *Ericsson, Inc. v. Harris Corp.*, 352 F.3d 1369, 1377 (Fed. Cir. 2003) (holding "the patentee must show 'a reasonable probability that 'but for' the infringing activity, the patentee would have made the infringer's sales," but rejecting proposition that statistical analysis is required). *See also Heller v. Shaw*, 167 F.3d 146, 152-53 (3d Cir. 1999) ("if there are 'good grounds' for the expert's conclusion, it should be admitted. ... [A] district court must examine the expert's conclusions in order to determine whether they *could* reliably follow from the facts known to the expert and the methodology used.") (emphasis added).[5]

Under the interpretation of Rules 702 and 703 uniformly applied prior to the decision below, expert estimates of lost market share, lost profits or other damages based on judgment and expertise rather than a statistical analysis are excluded "[o]nly if the expert's opinion is so fundamentally unsupported that it can offer no assistance to the jury ...."

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[5] Other Circuits employ similar, although perhaps less well-articulated, standards. *See, e.g., International Adhesive Coating Co. v. Bolton Emerson Int'l, Inc.*, 851 F.2d 540, 544-45 (1st Cir. 1988) (expert estimate of lost profits based on review of plaintiff's financial records and "interviews with company personnel" satisfied Rule 703's requirements); *LePage's Inc. v. 3M*, 324 F.3d 141, 165 (3d Cir. 2003) (affirming admission of expert who estimated lost market share as part of "yardstick for measuring what, hypothetically, would have happened 'but for' the defendant's unlawful activities" in antitrust case).

Children's Broad. Corp. v. Walt Disney Co., 357 F.3d 860, 865 (8th Cir. 2004).

Under the Seventh Circuit's elevated Rule 702 and 703 standard, which requires that an expert calculation of lost market share meet the "standards of science," the flexibility of this Court's jurisprudence on expert testimony would give way to the type of testimony normally associated with the natural sciences. By requiring a multivariate regression analysis or other "statistical or econometric means of coping with variance across markets" the Seventh Circuit's decision imposes a debilitating requirement not contemplated by Rules 702 or 703 or this Court's decisions interpreting them.

Contrasting the rigid scientific requirements of the decision below with the Eleventh Circuit's view on economic testimony demonstrates the compelling need for this Court's guidance on the admission of business valuation opinions from an expert witness:

> Economic or statistical analysis of markets ... cannot readily be repeatedly tested, because each such case is widely different from other such cases and because such cases cannot be made the subject of repeated experiments. The proper inquiry regarding the reliability of the methodologies implemented by economic and statistical experts in this context is not whether other experts, faced with substantially similar facts, have repeatedly reached the same conclusions (because there will be few or no cases that have presented substantially similar facts).

City of Tuscaloosa v. Harcros Chems., Inc., 158 F.3d 548, 566 n.25 (11th Cir. 1999) (abuse of discretion to exclude financial analysis for lack of testing). This conflict has led

several district courts to express frustration in their attempt to apply the *Daubert* factors to business valuation opinions. *See, e.g., Cayuga Indian Nation v. Pataki,* 83 F. Supp. 2d 318, 323 (N.D.N.Y. 2000) (*Daubert* factors unhelpful in ascertaining reliability of unique income valuation); *Allapattah Servs., Inc. v. Exxon Corp.*, 61 F. Supp. 2d 1335, 1345 (S.D. Fla. 1999) (not all *Daubert* factors relevant to economic testimony); *Ohio ex rel. Montgomery v. Louis Trauth Dairy, Inc.*, 925 F. Supp. 1247, 1252 (S.D. Ohio 1996) ("the Daubert analysis should be modified in the case of social science or other non-scientific expertise"); *In re Aluminum Phosphide Antitrust Litig.*, 893 F. Supp. 1497, 1506 (D. Kan 1995) (*Daubert* factors "may not be relevant in determining the reliability of expert testimony on non-scientific or social science subjects").

Accordingly, this Court's guidance is vitally necessary to establish uniformity in the broad range of commercial cases in which expert testimony on business valuation is a recurring event.

B. The Court of Appeals Conditioned the Admissibility of Expert Testimony on An Irrelevant Standard

There are no facts in the record to support the Seventh Circuit's assumption that the application of multivariate regression or other statistical or econometric means of coping with variance across markets is the standard practice of experts in Shapiro's field or that such analysis would be helpful, appropriate or even possible in this case given the existing data (or lack thereof) from other markets.

In the absence of such evidence in the record below, the Seventh Circuit rested its decision on the Federal Judicial

Center's *Reference Manual on Scientific Evidence* (2d ed. 2000), stating that "[r]egression analysis is common enough in litigation to earn extended treatment in [the *Reference Manual*]," and faulting the expert because he "neither employed any of the methods covered in the *Reference Manual* nor explained why he hadn't." App. 6-7a. The Seventh Circuit assumed that any methodology that appears in the *Reference Manual* may be considered one "that characterizes the practice of an expert in the relevant field" and that failure to employ such a method "just demonstrate[s] that he's not an 'expert' in the first place." *Id.*

The Seventh Circuit's assumption was incorrect. The *Reference Manual* does not have the force of law and does not establish proof or production standards for the admissibility of expert testimony. *Marvin Lumber & Cedar Co. v. PPG Indus., Inc.*, 401 F.3d 901, 915-16 (8th Cir. 2005). In the Preface to the *Reference Manual*, the Director of the Federal Judicial Center stated: "[w]e continue to caution judges regarding the proper use of the reference guides. They are not intended to instruct judges concerning what evidence should be admissible or to establish minimum standards for acceptable scientific testimony." *Reference Manual*, at vi. Nor does any other law or authority require an expert to explain his or her decision not to use a particular method of analysis.

Moreover, leading commentators have cautioned against using regression analysis to forecast future events: "It is not advisable to use an estimated regression relationship for extrapolation. ... Such extrapolation is dangerous, because although the model may fit the data quite well, there is no evidence that the model is appropriate outside the range of the existing data." Rudolf J. Freund & William J. Wilson, *Regression Analysis: Statistical Modeling of a Response*

Variable 65 (Academic Press 1998). *See also* Douglas C. Montgomery & Elizabeth A. Peck, *Introduction to Linear Regression Analysis* 4, 42 (2d ed. 1992) ("[r]egression analysis is widely used and, unfortunately, frequently *misused*.") (emphasis in original). Statistical correlations among data points from one market do not necessarily mean that the same correlations will be found in the next. Insistence on the use of regression analysis may, therefore, provide a false sense of certainty but such analysis may, in fact, provide no more certainty, and perhaps less, than an expert's judgment.

The Seventh Circuit had no record on which to base its opinion that regression analysis or other statistical or econometric methods are the standard practice in the relevant field or are appropriate in cases such as the one at bar. In the absence of a factual record, the court lacked an informed basis to make econometric analysis a condition of admissibility. The necessity for regression or other statistical analyses had to be adequately presented in the trial court to permit an opportunity to submit affidavits or other evidence to contest the issue. *Cf. Jakfe v. Dunham*, 352 U.S. 280, 281 (1957) ("A successful party in the District Court may sustain its judgment on any ground that finds support in the record").

If regression analyses or other statistical methods are to become the standard for expert damages testimony, they should become so in the rule-making process rather than the type of judicial fiat expressed below. This Court should determine whether the suggestions of the *Reference Manual* should be engrafted on the standards of Rule 702 and 703.

CONCLUSION

For the reasons stated, certiorari should be granted to review and ultimately reverse the decision below.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Nos. 04-1635 & 04-1790

[Filed February 8, 2005]

ZENITH ELECTRONICS CORP., Plaintiff-Appellee, Cross-Appellant,	)
v.	)
WH-TV BROADCASTING CORP., Defendant-Appellant, Cross-Appellee.	)

Before Hon. FRANK H. EASTERBROOK, Circuit Judge, Hon. MICHAEL S. KANNE, Circuit Judge, Hon. TERENCE T. EVANS, Circuit Judge

ORDER

Defendant-appellant, cross-appellee filed a petition for rehearing on February 3, 2005. All of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 04-1635 & 04-1790

[Filed January 20, 2005]

ZENITH ELECTRONICS CORP., Plaintiff-Appellee, Cross-Appellant,	)
v.	)
WH-TV BROADCASTING CORP., Defendant-Appellant, Cross-Appellee.	)

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division
No. 01 C 4366
George W. Lindberg, Judge

Before EASTERBROOK, KANNE, and EVANS,
Circuit Judges.

OPINION

EASTERBROOK, *Circuit Judge*. WH-TV broadcasts a digital television signal in San Juan, Puerto Rico, competing with cable and direct-broadcast satellite services. Seeking to

expand its business, it purchased set-top boxes from Zenith Electronics. These boxes, which broadcasters furnish to subscribers, convert the digital input into an analog output that TV sets can display. Boxes may have other functions, such as presenting a programming grid from which subscribers can choose their favorites, and descrambling pay-per-view shows. WH-TV wanted boxes that use the digital video broadcasting (DVB) standard, so that it could mix equipment from different vendors and upgrade its broadcasting gear to take advantage of the latest features. Zenith assured WH-TV that its boxes conform to the DVB standard. By this Zenith meant the 1995 version of that standard -- though WH-TV thought that Zenith meant the 1998 version, which had been adopted a year before the sales, and planned its operations on that assumption. A trier of fact could find that Zenith misled WH-TV or at least withheld material information and that the consequences were unhappy for WH-TV and its customers: the broadcaster lost business when customers encountered problems in using the boxes, and it was unable to substitute other vendors' boxes, because they did not speak the same dialect of the DVB standard. We must assume, given the posture of the case, that serious problems existed and were Zenith's fault.

Zenith filed suit to collect unpaid bills for boxes it delivered; WH-TV filed a counterclaim seeking to recover for profits it says it lost because of defects in Zenith's merchandise. After extended proceedings that we need not recount, the district court granted summary judgment in Zenith's favor, holding that it had a right to payment under the contract while WH-TV would be unable to establish damages at trial. 2003 U.S. Dist. LEXIS 11037 (N.D. Ill. June 25, 2003), 2003 U.S. Dist. LEXIS 13819 (N.D. Ill. Aug. 6, 2003), 2003 U.S. Dist. LEXIS 17661 (N.D. Ill. Oct. 1, 2003). WH-TV proposed to rely on the testimony of Peter

Shapiro that its business would have grown rapidly, and its profits ballooned, had Zenith's boxes been as promised. The district judge excluded this projection under Fed. R. Evid. 702 as unreliable, knocking out this theory independent of any limitations on the recovery of lost profits specified by Zenith's sales documents and the doctrine of *Hadley v. Baxendale*, 9 Ex. 341, 156 Eng. Rep. 145 (1854). Although WH-TV might have been able to show loss based on defects in the boxes Zenith actually provided, that route was closed, the judge concluded, by WH-TV's failure to provide a responsive answer to Zenith's contentions interrogatory. WH-TV was left with no evidence about damages.

Shapiro proposed to testify that, with set-top boxes meeting the 1998 DVB standard and otherwise up to snuff, WH-TV would have experienced rapid growth paralleling that of DirecTV, the leading satellite broadcaster. Shapiro's estimate had two components: first the number of customers in San Juan who would have subscribed to DirecTV during the period 2002 through 2008, and second the percentage of those customers who would have used WH-TV instead, had WH-TV been able to offer customers service better than Zenith's equipment allowed. Shapiro might have based at least the former on DirecTV's actual sales in other markets, but he did not do so. Instead he proposed to testify that San Juan is "unique" and that all experience in other markets is irrelevant. He took the same approach to the second task, estimating WH-TV's potential share of the digital-broadcasting business. WH-TV uses a technology known as multipoint multichannel digital system or MMDS. Other markets have MMDS service using equipment that meets the 1998 DVB standard, and Shapiro might have used data from these to gauge the potential for such a service in San Juan, relative to the number of potential subscribers (principally hotels plus households that lack access to cable TV service).

Again, however, Shapiro made no effort to calculate the potential subscriber base or use data from other markets (other than one in Mexico, which he eyeballed but did not analyze) to inform his projection about San Juan. Each market is unique, Shapiro insisted, making experience else where irrelevant.

Expert evidence is admissible under Rule 702 when "(1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case." See also *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999), which interpret an earlier version of Rule 702. The district judge thought that Shapiro's failure to look outside San Juan, even for a reality check, meant that he lacked "sufficient" facts. Shapiro himself all but conceded that he had not applied "reliable principles and methods". Asked repeatedly during his deposition what methods he *had* used to generate projections, Shapiro repeatedly answered "my expertise" or some variant ("my industry expertise", "[my] awareness," and "my curriculum vitae")--which is to say that he either had no method or could not describe one. He was relying on intuition, which won't do. See, e.g., *McMahon v. Bunn-O-Matic Corp.*, 150 F.3d 651, 658 (7th Cir. 1998); *Rosen v. Ciba-Geigy Corp.*, 78 F.3d 316, 319 (7th Cir. 1996).

Appellate review of a decision under Rule 702 is deferential, see *General Electric Corp. v. Joiner*, 522 U.S. 136, 118 S. Ct. 512, 139 L. Ed. 2d 508 (1997), and the judge did not abuse his discretion. The supposed "uniqueness" of a market does not justify substituting a guess for careful

analysis. Cities differ in size, average income, levels of education, availability of over-the-air TV signals, and other factors that might affect the demand for MMDS service. But social science has tools to isolate the effects of multiple variables and determine how they influence one dependent variable--here, sales of MMDS service. Perhaps the leading tool is the multivariate regression, which is used extensively by all social sciences. Regression analysis is common enough in litigation to earn extended treatment in the Federal Judicial Center's *Reference Manual on Scientific Evidence* (2d ed. 2000). Regression has its own chapter (*Reference Guide on Multiple Regression*, prepared by Daniel L. Rubinfeld, at *Reference Manual* 179-228) and plays a leading role in two more: David H. Kaye & David A. Freedman, *Reference Guide on Statistics*, at *Reference Manual* 83-178, and Robert E. Hall & Victoria A. Lazear, *Reference Guide on Estimation of Economic Losses in Damages Awards*, at *Reference Manual* 277-332. Shapiro neither employed any of the methods covered in the *Reference Manual* nor explained why he hadn't.

Judges asked to determine whether an approach is "reliable" by the standards of science encounter the problem that we are lawyers rather than scientists. See *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311 (9th Cir. 1995). It will not do to stop with lawyers' arguments pro and con, for these may fail to appreciate the difficulties that bona fide experts encounter. Scientific decisions must be made by scientific rather than rhetorical means. See *DePaepe v. General Motors Corp.*, 141 F.3d 715, 720 (7th Cir. 1998). But even a lawyer knows enough to insist that experts follow scientific approaches normal to their disciplines. See *Frymire-Brinati v. KPMG Peat Marwick*, 2 F.3d 183, 186 (7th Cir. 1993). Rule 702 uses words such as "sufficient" and "reliable" to describe these norms. An expert must offer good

reason to think that his approach produces an accurate estimate using professional methods, and this estimate must be testable. Someone else using the same data and methods must be able to replicate the result. Shapiro's method, "expert intuition," is neither normal among social scientists nor testable--and conclusions that are not falsifiable aren't worth much to either science or the judiciary.

On this record one cannot exclude the possibility that some problem blocked the use of multivariate regression and other statistical tools. But that would be surprising, and as proponent of the testimony WH-TV had a burden of production on the subject. See *Maryland Casualty Co. v. Therm-O-Disc, Inc.*, 137 F.3d 780 (4th Cir. 1998). Neither Shapiro nor any of WH-TV's lawyers discussed statistical or econometric means of coping with variance across markets; the record contains nothing suggesting that these would have been inadequate if tried. Indeed, the record does not contain any hint why Shapiro preferred intuition to the empirical tool kit of the social sciences. And if Shapiro did not use these devices because he does not know how: that would just demonstrate that he's not an "expert" in the first place.

A witness who invokes "my expertise" rather than analytic strategies widely used by specialists is not an expert as Rule 702 defines that term. Shapiro may be the world's leading student of MMDS services, but if he could or would not explain how his conclusions met the Rule's requirements, he was not entitled to give expert testimony. As we so often reiterate: "An expert who supplies nothing but a bottom line supplies nothing of value to the judicial process." *Mid-State Fertilizer Co. v. Exchange National Bank*, 877 F.2d 1333, 1339 (7th Cir. 1989). See also, e.g., *Bucklew v. Hawkins, Ash, Baptie & Co.*, 329 F.3d 923, 933 (7th Cir. 2003); *Huey v. United Parcel Service, Inc.*, 165 F.3d 1084, 1087 (7th Cir.

1999); *Burns Philp Food, Inc. v. Cavalea Continental Freight, Inc.*, 135 F.3d 526, 530-31 (7th Cir. 1998); *Navarro v. Fuji Heavy Industries, Ltd.*, 117 F.3d 1027, 1031 (7th Cir. 1997); *People Who Care v. Rockford Board of Education*, 111 F.3d 528, 537-38 (7th Cir. 1997); *Braun v. Lorillard Inc.*, 84 F.3d 230, 235 (7th Cir. 1996). WH-TV observes that experts sometimes must extrapolate from existing data, as Shapiro did, but this cannot justify his lack of discipline. "Experts commonly extrapolate from existing data. But nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence which is connected to existing data only by the *ipse dixit* of the expert." *General Electric*, 522 U.S. at 146. That's a fair description of Shapiro's proposed testimony.

What we have said about Shapiro's approach goes double for WH-TV's internal projections, which rest on its say-so rather than a statistical analysis. Like many other internal projections, these represent hopes rather than the results of scientific analysis. See *Target Market Publishing, Inc. v. ADVO, Inc.*, 136 F.3d 1139, 1145-46 (7th Cir. 1998). Rule 701, which allows managers to offer the facts underlying such projections without the need to qualify as an expert, see *Securitron Magnalock Corp. v. Schnabolk*, 65 F.3d 256, 265 (2d Cir. 1995); *Lightning Lube, Inc. v. Witco Corp.*, 4 F.3d 1153 (3d Cir. 1993), does not assist WH-TV, because its claimed losses depend on the inferences to be drawn from the raw data, rather than these data (or their internal appreciation) themselves. Reliable inferences depend on more than say-so, whether the person doing the saying is a corporate manager or a putative expert. See *Lifewise Master Funding v. Telebank*, 374 F.3d 917, 928 (10th Cir. 2004). And per-subscriber valuations prepared in connection with potential sales of the business don't provide a reliable estimate of the number of subscribers that WH-TV could have secured with

better set-top boxes. See *TK-7 Corp. v. Estate of Barbouti*, 993 F.2d 722, 735 (10th Cir. 1993).

That leaves only the possibility of damages based on defects in the units Zenith actually furnished (as opposed to lost growth and future profits). The district judge banned evidence on that subject after WH-TV failed to respond to Zenith's contentions interrogatory with a description of its damages theory and the proof to be employed. The judge's sanction is one of those named by the federal rules for failure to cooperate in discovery. See Fed. R. Civ. P. 37(b)(2)(B). His decision was not an abuse of discretion.

WH-TV does not otherwise contest Zenith's demand for payment on its invoices. Because WH-TV's defense and counterclaim fail, it is unnecessary to discuss third-party claims and disputes involving Motorola, Inc., and General Instrument Corporation. These derivative issues are of no moment given the outcome of the principal suit.

AFFIRMED

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 01 C 4366

[Filed October 1, 2003]

ZENITH ELECTRONICS CORPORATION,
Plaintiff/Counter-Defendant,

v.

WH-TV BROADCASTING CORPORATION,
Defendant/Counter-Plaintiff.

George W. Lindberg, Senior U.S. District Judge

DOCKET ENTRY:

Judgment is entered in favor of Zenith on count I of WH-TV's third amended counterclaim(fraud). Judgment is entered as a matter of law in favor of GI and Motorola on WH-TV's third-party promissory estoppel claims. The parties are directed to notify the court by October 8, 2003 regarding which, if any pending motions in limine are moot in light of this order. The parties should identify each such motion by

title and docket number. Enter memorandum opinion and order.

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 01 C 4366

[Filed October 1, 2003]

ZENITH ELECTRONICS CORPORATION, Plaintiff/Counter-Defendant,	)
v.	)
WH-TV BROADCASTING CORPORATION, Defendant/Counter-Plaintiff.	)

Judge George W. Lindberg

MEMORANDUM OPINION AND ORDER

As indicated in the final pretrial order, WH-TV maintains counterclaims of fraud in the inducement and breach of contract against Zenith, and a third-party claim of promissory estoppel against GI and Motorola. The court has conducted a pretrial conference pursuant to Federal Rule of Civil Procedure 16(c)(1), for the purpose of determining whether these claims should be eliminated as a matter of law. Rule 16(c)(1) provides that at a pretrial conference, the court "may take appropriate action, with respect to...the formulation and simplification of the issues, including the elimination of frivolous claims or defenses[.]" The advisory committee notes following Rule 16 explain that "[t]here is no reason that this [the elimination of frivolous claims] await a formal motion for summary judgment." For the reasons stated below, the court

finds that Zenith is entitled to judgment as a matter of law on WH-TV's fraud claim, and GI and Motorola are entitled to judgment as a matter of law on WH-TV's promissory estoppel claim.

In orders entered over the past three months, this court has limited the evidence WH-TV may present at trial on damages. In orders entered on June 25, 2003 and August 6, 2003, this court barred WH-TV's damages expert, Peter Shapiro, from testifying as to profits he projects WH-TV lost from future subscribers WH-TV would have enrolled through 2008, absent Zenith's breach. This decision was based on the finding that Shapiro's methodology for projecting the number of future subscribers was not reliable under *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993). In addition, the August 6, 2003 order clarified that WH-TV is not precluded from presenting evidence of profits it would have earned from its existing subscribers, including projections of subscriber growth attributable to the growth in households in WH-TV's signal area. The court denied WH-TV's motion to reconsider these orders.

In an order entered on July 23, 2003, this court barred WH-TV from introducing evidence of damages other than what was disclosed in its expert reports. This ruling was based on WH-TV's failure to provide a responsive answer to a Zenith contention interrogatory asking for the nature, amount, and basis for calculation of damages, other than its expert reports. The order states that WH-TV's references to documents in its answer, including WH-TV's financial projections and agreements, were not responsive to the interrogatory. In a September 17, 2003 order denying WH-TV's motion to reconsider the July 23, 2003 order, this court explained that its prior order limited WH-TV's evidence of damages to the *damages* disclosed in the expert reports, and

did not permit WH-TV to offer any isolated fact mentioned in its expert reports as evidence of damages. The court concluded that because WH-TV's expert did not identify the cost of the set-top boxes and head-end equipment as damages, evidence of those costs is barred.

In the final pretrial order, WH-TV itemized its damages against Zenith as $20,128,706 to $27,471,776, "[a]s per the Rebuttal Report of Peter Shapiro Ph.D. (subject to reconsideration and/or FRE Rule 103(a))." WH-TV then lists the following as "DAMAGES IN THE ALTERNATIVE IF THE SHAPIRO REPORT REMAINS EXCLUDED":

- $2,603,033 as "Cost of Zenith's STBs (unjust enrichment)"
- $3,909,875 as "Cost of Head-End"
- $6,272,49I as "Losses reflected in financial statements 1999-trial date"
- "in excess of $12,000,000.00" as "Projections of earnings as of March 27, 1998 by Miguel Rodriguez, CPA"
- prejudgment interest, and
- punitive damages.

In the final pretrial order, WH-TV itemized its damages against GI and Motorola as $4,256,359 to $7,925,459, "[a]s per the Post-8/8/00 Report of Peter Shapiro Ph.D."

The court conducted a pretrial conference under Rule 16(c)(1) on September 16 and 25, 2003. At the conference, in

response to the court's request that counsel for WH-TV state what damages it contends it still can prove, counsel only identified lost profits from future subscribers. When the court asked counsel how it intended to prove such damages in light of the court' s prior orders, counsel responded that WH-TV business managers could testify as to the number of future subscribers WH-TV planned to enroll when it launched its digital service, and that WH-TV's expert, Peter Shapiro, could then calculate the profits WH-TV lost, based on that number of subscribers. Alternatively, argued WH-TV, Shapiro could opine as to WH-TV's lost profits based solely on unsupported facts contained in a hypothetical supplied by counsel.

As Zenith noted at the hearing, WH-TV is already foreclosed from offering lay testimony to establish future subscriber growth. On September 16, 2003, the court entered an order addressing Zenith's Motion in Limine to Bar Lay Opinion Testimony Regarding WH-TV's Future Subscriber Growth. In that order, the court denied Zenith's motion as moot, based on WH-TV's representation in its response brief that:

> ...the Court should reconsider its July 23, 2003, Order in part and permit evidence of WHTV's financial plans and projections. Only if the Court reconsiders its July 23, 2003, Order, do Zenith's arguments regarding (1) the ability of lay witnesses to testify as to damages, (2) the foundation for WHTV's projections and (3) the admissibility of those projections as a business record become relevant.

At the Rule 16(c)(1) conference, WH-TV argued that its representation in its response brief actually meant that Zenith's motion was only moot if the court declined to

reconsider its July 23, 2003 order to allow WH-TV to use its financial plans and projections as direct evidence of damages. WH-TV argued that now it intends to use lay opinion testimony, not to establish the amount of future lost profits, but to establish the number of future subscribers it would have enrolled; Shapiro would then use that number to opine on the amount of damages.

The court fails to see this strained distinction in WH-TV's response brief. Moreover, even if the court addresses the merits of the issue, WH-TV still would be unable to offer this lay opinion testimony. Federal Rule of Evidence 701 limits a lay witness' opinion testimony to

> opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

WH-TV seeks to use its business managers to prove that WH-TV would have enrolled a specific number of future subscribers absent Zenith's breach. WH-TV's business managers may well have sufficient personal knowledge of the existing operations of the business to allow them to offer opinions as to losses of existing customers, and the corresponding loss of profits. However, any opinions as to future sales to future customers are necessarily based on market analysis. Such an analysis would not be based on the business managers' perception or personal knowledge, and would require specialized knowledge. *See KW Plastics v. U.S. Can Co.*, 131 F. Supp. 2d 1265, 1274 (M.D. Ala. 2001) (stating that while manager "may have sufficient personal knowledge based upon his own experience in the industry to

provide some type of economic testimony and data, it does not necessarily follow that he has personal knowledge sufficient to project lost profits for six years into the future *on the basis of the loss of customers that KW never had.*"); *see also generally* Martin G. Gilbert, *Proving Lost Profits Through Lay Opinion Testimony – Is the Back Door Still Open*?, 22 Franchise L.J. 15 (2002). Allowing WH-TV's business managers to offer their projections relating to future subscribers would permit WH-TV to evade the reliability requirements of expert witnesses "through the simple expedient of proffering an expert in lay witness clothing," a strategy that Rule 701 was designed to eliminate. *See* Fed. R. Evid. 701 advisory committee's note.

Nor is the court persuaded by WH-TV's argument that it could offer to its expert a hypothetical number of future subscribers – based on nothing more than counsel's imagination and the expert could use that number to opine on lost future profits. WH-TV cites *Tuf Racing Prods., Inc. v. American Suzuki Motor Corp.*, 223 F.3d 585 (7th Cir. 2000) for this proposition. In *Tuf Racing Products*, the defendant argued that the plaintiff should not have been able to use an accountant to provide expert testimony on lost profits damages because the accountant did not have a degree in an academic field that might bear on his calculation of damages. *Id.* at 591. The Seventh Circuit rejected this argument on the basis that *Daubert* does not require an expert witness to have any particular credentials, and that the accountant's calculations were within his area of competence. *Id.*

WH-TV's reliance on *Tuf Racing Products* for the proposition that an expert may offer an opinion based on an unsupported hypothetical appears to stem entirely from the following portion of the opinion:

> From financial information furnished by Tuf and assumptions given him by counsel of the effect of the termination on Tuf's sales, the accountant calculated the discounted present value of the lost future earnings that Tuf would have had had it not been terminated. This was a calculation well within the competence of a C.P.A.

Id. WH-TV's misguided reading of this brief excerpt would nullify the portion of Federal Rule of Evidence 702 that requires an expert's testimony to be "based upon sufficient facts or data." Certainly an expert may offer an opinion in response to a hypothetical question posed by counsel, as apparently did the accountant in *Tuf Racing Products*. However, the hypothetical question must be based in fact, an issue that was not raised in *Tuf Racing Products*. WH-TV's argument that a jury could rely on an expert opinion regarding lost profits that is based on a projection of future subscribers concocted entirely from the imagination of counsel, is absurd.

According to WH-TV's counsel at the Rule 16(c)(1) conference, the only type of compensatory damages WH-TV seeks are lost future profits. In light of this court's prior orders, the court concludes that, as a matter of law, WH-TV cannot prove such damages. Injury is an element of both fraud and promissory estoppel. *See Roboserve, Inc. v. Kato Kagaku Co., Ltd.*, 78 F.3d 266, 274 (7th Cir. 1996) (fraud); *Quake Constr., Inc. v. American Airlines, Inc.*, 565 N.E.2d 990, 1004 (Ill. 1990) (promissory estoppel). Without the ability to prove damages, WH-TV's claim of fraud against Zenith, and its claim of promissory estoppel against GI and Motorola, must fail as a matter of law. However, "a failure of proof of damages does not justify the dismissal of a claim for breach of contract, as it does for most tort claims. The

victim of a breach of contract is always entitled to nominal damages if he proves a breach but no damages." Olympia Hotels Corp. v. Johnson Wax Dev. Corp., 908 F.2d 1363, 1372 (7th Cir. 1990); see also Hydrite Chem. Co. v. Calumet Lubricants Co., 47 F.3d 887, 891 (7th Cir. 1995). Accordingly, WH-TV may proceed to trial on its breach of contract claim against Zenith, although its damages are limited to nominal damages.[1]

ORDERED: Judgment is entered as a matter of law in favor of Zenith on Count I of WH-TV's Third Amended Counterclaim (fraud). Judgment is entered as a matter of law in favor of GI and Motorola on WH-TV's third-party promissory estoppel claims. The parties are directed to notify the court by October 8, 2003 regarding which, if any, pending motions in limine are moot in light of this order. The parties should identify each such motion by title and docket number; the court will supply the parties with a list of motions pending in this case, with their docket numbers.

ENTER:

/s/_____
George W. Lindberg
Senior U.S. District Judge

DATED: Oct. 01, 2003

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[1] Zenith's claims against WH-TV and GI also remain.

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 01 C 4366

[Filed September 17, 2003]

ZENITH ELECTRONICS CORPORATION,
Plaintiff/Counter-Defendant,

v.

WH-TV BROADCASTING CORPORATION,
Defendant/Counter-Plaintiff.

George W. Lindberg, Senior U.S. District Judge

DOCKET ENTRY:

WH-TV's Motion for Reconsideration of the Court's Orders Regarding WH-TV's Damages Expert and for a *Daubert* Hearing [719-1] is denied.

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 01 C 4366

[Filed August 6, 2003]

ZENITH ELECTRONICS CORPORATION,
Plaintiff/Counter-Defendant,

v.

WH-TV BROADCASTING CORPORATION,
Defendant/Counter-Plaintiff.

George W. Lindberg, Senior U.S. District Judge

DOCKET ENTRY:

WH-TV's motion for reconsideration of the Court's Order of June 25, 2003, Regarding the Testimony of Dr. Peter Shapiro (559-1) is denied. WH-TV's motion for clarification of the Court's Order of June 25, 2003, regarding the Testimony of Dr. Peter Shapiro (559-2) is granted. Zenith's motion to reconsider and Bar the Testimony of Peter Shapiro in its entirety (604-1) is granted in part and denied in part.

Enter memorandum opinion and order.

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 01 C 4366

[Filed August 6, 2003]

ZENITH ELECTRONICS CORPORATION, Plaintiff/Counter-Defendant,	)
v.	)
WH-TV BROADCASTING CORPORATION, Defendant/Counter-Plaintiff.	)

George W. Lindberg, Senior U.S. District Judge

MEMORANDUM OPINION AND ORDER

On June 25, 2003, this court granted in part and denied in part Zenith Electronics Corporation's ("Zenith") motion in limine to exclude the testimony of WH-TV Broadcasting Corporation's ("WH-TV") damages expert Peter Shapiro. Zenith and WH-TV both move for reconsideration of that ruling. For the reasons stated below, WH-TV's motion for reconsideration is denied, and Zenith's motion for reconsideration is granted in part and denied in part.

Shapiro had opined that, if set-top boxes ("STBs") supplied by Zenith to WH-TV had not been defective, and had WH-TV been able to launch its digital television service as planned, WH-TV's subscriber base would have increased

to 26,000 to 31,000 by 2008. Shapiro then predicted the amount of future profits WH-TV would have lost, based on the number of future subscribers he predicted WH-TV would have had. Shapiro arrived at this opinion by first projecting the growth of WH-TV's competitor, DirecTV, in Puerto Rico through 2008, then predicting the percentage of that projected growth WH-TV would have captured had it been able to launch its digital service as planned.

The court granted Zenith's motion as to evidence of WH-TV's future lost profits after 2002, and denied it as to evidence of WH-TV's future lost profits through 2002. Specifically, the court found that Shapiro's opinions regarding WH-TV's future lost profits after 2002 were not reliable because Shapiro did not test his methodology for predicting DirecTV's growth after 2002. The court found, however, that Shapiro's methodology for arriving at opinions regarding WH-TV's growth through 2002 was reliable, because it used DirecTV's actual data, and compared his prediction regarding WH-TV's market share in 2002 with the results in a market in Mexico. WH-TV moves for reconsideration of the portion of the court's order that excludes Shapiro's testimony regarding future lost profits after 2002. Zenith moves for reconsideration of the portion of the order that allows WH-TV to present evidence of lost profits through 2002.

WH-TV first takes issue with the court's finding that Shapiro did not test his methodology for predicting DirecTV's growth after 2002. In connection with that finding, the court noted that Shapiro had not actually compiled any data from other markets to use in comparing his projected growth rate for DirecTV. As in its original briefs, WH-TV points to Shapiro's testimony that he is generally aware of the growth of digital broadcast service in the mainland United States, and that he reviewed those growth numbers. However, Shapiro

also testified that he did not use those numbers "mathematically or arithmetically to tie into [this case]," and that he only "unspecifically" referred to them. Since Shapiro did not include such data in his report, and WH-TV did not otherwise disclose it prior to the close of discovery, Zenith cannot test Shapiro's methodology. The court declines to reconsider this finding.

WH-TV and Zenith both argue that the court erred in its evaluation of Shapiro's comparison of his predictions regarding WH-TV's growth with results from a market in Mexico. WH-TV takes issue with the court's finding that Shapiro's opinion regarding WH-TV's growth after 2002 was not reliable because he only compared the Mexican results with his predictions of WH-TV's market share in 2002, without comparing his predictions relating to WH-TV's growth after 2002 with results from any other market. The court need not address WH-TV's argument on this point, however, because it has already determined that Shapiro's starting point for his prediction relating to WH-TV's future growth - his prediction relating to DirecTV's growth after 2002 - was not reliable. Thus, if Shapiro's methodology for predicting DirecTV's growth during that period was not reliable, his conclusions regarding the portion of that growth WH-TV would have captured cannot be reliable either.

The court turns to Zenith's argument that the court erred in finding that Shapiro's predictions relating to WH-TV's growth through 2002 were reliable. Shapiro projected that WH-TV would have initially captured 15% of DirecTV's growth during a "transition phase," when DirecTV offered only one local station and WH-TV was just beginning to convert its analog subscribers. He projected that WH-TV then would have captured 30% of DirecTV's growth during a period when WH-TV was actively marketing its service to

new subscribers and DirecTV still offered only one local station. Shapiro projected that WH-TV then would have captured 20%, and eventually 10%, of DirecTV's growth, as DirecTV increased its local programming.

Shapiro did not test this methodology against the experience of any other market. Shapiro explained in his deposition that the Puerto Rican market was unique, and that there were no other comparable markets. Although he did not test his methodology against the experience of the Mexican market because that market was "not directly relevant" to the Puerto Rican market, Shapiro did compare his conclusions as to the portion of DirecTV's growth he predicted WH-TV would have captured in 2002 against actual data from the Mexican market. In that comparison, Shapiro observed that the Mexican market had an Multipoint Multichannel Digital System ("MMDS") operator with "less compelling service" than WH-TV (the Mexican operator offered analog service), and had more intense competition from both wired cable and satellite providers. The Mexican MMDS operator achieved an 8.6% share of households receiving multi-channel services. Shapiro had forecast that WH-TV would have achieved only 4.3% of Puerto Rico's multi-channel services subscribers in 2002. Based on his comparison with the results from the Mexican market, Shapiro reasoned that his predictions regarding WH-TV were reasonable and conservative.

Zenith argues that the court erred in crediting this comparison to the extent that it did, because Shapiro's comparison is only offered to demonstrate that his results are reasonable, a demonstration that is not relevant to a determination of whether Shapiro's methodology was reliable. Zenith also argues that Shapiro's use of a "snapshot" comparison between his prediction of WH-TV's market share in a single year (2002) with the Mexican results in the same

year does not test whether the trend from 1999 through 2008 that Shapiro predicts for WH-TV is comparable to the trend in the Mexican market.

The court has reconsidered its conclusions regarding this portion of its ruling, and agrees with Zenith. The court's focus here "must be solely on principles and methodology, not on the conclusions they generate." *See Chapman v. Maytag Corp.*, 297 F.3d 682, 687 (7th Cir. 2002). It is clear from Shapiro's report and testimony that his comparison of his projection of WH-TV's market share for 2002 with the Mexican results did not test Shapiro's methodology. While it may be useful to perform such a cross-check on the results after the fact, it is insufficient to validate that the methodology used to generate the results is reliable.

The court next re-examines the methodology Shapiro used in projecting WH-TV's market share through 2002 to determine whether it is reliable, despite not having been tested against the experience of another market. Shapiro stated that he arrived at his estimates by balancing factors such as the number of local stations offered, antenna size, local versus non-local orientation of programming, customer payment procedures, channel capacity, pricing, advertising resources, and local distrust of satellite service as a result of an earlier failure of another satellite provider in Puerto Rico. However, Shapiro does not explain how he weighed these factors and translated them into the 15%, 30%, 20%, and 10% portions of DirecTV's growth he forecasts. Indeed, in his deposition Shapiro characterized these projected market share numbers as "a forecast based on [his] judgment."

As the Supreme Court has observed, "[t]rained experts commonly extrapolate from existing data. But nothing in either *Daubert* or the Federal Rules of Evidence requires a

district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert." *General Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997). Since Shapiro does not explain how he arrived at the percentages he presents in his opinion, the court concludes that "there is simply too great an analytical gap between the data and the opinion proferred." *See id.* Shapiro's testimony regarding WH-TV's lost profits from new subscribers through 2002 is also barred.

Finally, WH-TV asks the court to clarify that it is not precluded from presenting evidence of profits WH-TV would have earned from its existing subscribers, including projections of subscriber growth attributable to the growth in households in WH-TV's signal area during that time. In his report, Shapiro states that by June 2002, WH-TV's penetration of households within its signal area was stable at approximately 1.1%. He projects that this level will persist through 2008, resulting in a growth of subscribers at the same rate as the growth of households. He notes that WH-TV's average monthly subscriber churn (the number of subscribers that disconnect, in proportion to the number of subscribers being served during a given time period) was 3.8% in 1999, 3.7% in 2000, 2.6% in 2001, and 3.3% in 2002. Shapiro assumes that WH-TV's monthly churn rate through 2008 will remain at 3.2%, which he recognizes is an "optimistic assumption," given WH-TV's weak market position. Since DirecTV entered the market in mid-1999, the historical data on which Shapiro relies in making these forecasts cover a period during which WH-TV was competing against DirecTV. The court finds that Shapiro's opinions relating to existing subscribers are reliable and may be offered at trial.

ORDERED: WH-TV's Motion for Reconsideration of the Court's Order of June 25, 2003, Regarding the Testimony of Dr. Peter Shapiro [559-1] is denied. WH-TV's Motion for

Clarification of the Court's Order of June 25, 2003, Regarding the Testimony of Dr. Peter Shapiro [559-2] is granted. Zenith's Motion to Reconsider and Bar the Testimony of Peter Shapiro in its Entirety [604-1] is granted in part and denied in part.

ENTER:

/s/_____
George W. Lindberg
Senior U.S. District Judge

DATED: Aug. 06, 2003

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 01 C 4366

June 27, 2003, Docketed

ZENITH ELECTRONICS CORPORATION,
Plaintiff/Counter-Defendant,

v.

WH-TV BROADCASTING CORPORATION,
Defendant/Counter-Plaintiff.

George W. Lindberg, Senior U.S. District Judge

MEMORANDUM OPINION AND ORDER

Zenith Electronics Corporation ("Zenith") has moved in limine to exclude the testimony of Peter Shapiro, the damages expert of WH-TV Broadcasting Corporation ("WH-TV"). Shapiro has opined that, if set-top boxes supplied by Zenith to WH-TV had not been defective, and had WH-TV been able to launch its digital television service as planned, WH-TV's subscriber base would have increased to 26,000 to 31,000 by 2008. Shapiro has predicted the amount of future profits WH-

TV would have lost, based on the number of future subscribers he predicts WH-TV would have had. Zenith urges the court to bar Shapiro's testimony on three grounds: (1) that his opinion is inadmissible under *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993); (2) that the new business rule bars the lost profits damages about which Shapiro opines; and (3) that Shapiro's calculation of damages includes damages that were not reasonably foreseeable. The court addresses each in turn.

I. Reliability Under Daubert

Zenith first urges the court to exclude Shapiro's testimony on the ground that his opinion is unreliable, and therefore inadmissible under *Daubert*. Federal Rule of Evidence 702 provides that:

> if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Under *Daubert*, the court is required to perform a gatekeeping function by examining the expert's methodology. *See Daubert*, 509 U.S. at 592-93. *Daubert* identifies nonexhaustive factors that the court may consider in determining whether an expert's testimony is reliable: (1) whether the theory can be and has been tested; (2) whether the theory has been subjected to peer review and publication;

(3) the known or potential rate of error; and (4) the general acceptance of the theory in the scientific community." Daubert, 509 U.S. at 593-94. The Daubert test has been applied to expert lost profits evidence, such is at issue in this case. *See Target Mkt. Publ'g, Inc. v. ADVO, Inc.*, 136 F.3d 1139, 1142-44 (7th Cir. 1998). As the proponent of Shapiro's testimony, WH-TV bears the burden of establishing its admissibility by a preponderance of the evidence. *See Abdishi v. Philip Morris*, No. 98 C 1310, 1999 WL 756054, at *2 (N.D. Ill. Sept. 7, 1999).

Zenith argues that Shapiro's opinion that WH-TV would have had 26,000 to 31,000 subscribers by the end of 2008 absent Zenith's breach, is based on improper, speculative assumptions. Shapiro arrived at this opinion by first projecting the growth of WH-TV's competitor, DirecTV, in Puerto Rico through 2008, then predicting the percentage of that projected growth WH-TV would have captured had it been able to launch its digital service as planned. Zenith takes issue with the reliability of Shapiro's methodology in both these steps.

Zenith first challenges Shapiro's calculation of the projected growth of DirecTV in WH-TV's service area for the years 2002 through 2008. Based on a review of data regarding DirecTV's performance island-wide in Puerto Rico between 1999 and mid-2002, Shapiro offers an opinion as to DirecTV's projected growth through 2008. According to Zenith, Shapiro has not objectively supported his method of extrapolating DirecTV's growth into the future, based merely on three years of data.

Shapiro testified that he used actual data of the growth rate of DirecTV's penetration into the Puerto Rican market through July 2002, which revealed that DirecTV's penetration

had grown at a very high rate. Shapiro then forecast that DirecTV's growth rate from July 2002 through 2008 would level off, from 36% in 2002 to 3% in 2008. Shapiro testified that his general awareness of the growth pattern of satellite services such as DirecTV's, along with his experience in the industry, informed his projection of DirecTV's growth rate in Puerto Rico from 2002 through 2008. Shapiro did not actually compile data from other markets and compare them to his projected growth rate for DirecTV in Puerto Rico, although he maintains a database of such information.[1] WH-TV explains that such a comparison study would not have been useful because Puerto Rico is a unique market.

WH-TV argues that Zenith's objection to Shapiro's reliance on data relating to DirecTV's actual market penetration from 1999 to 2002, and failure to use data from other markets, goes to the weight to be given to Shapiro's opinion, and not its admissibility. The court disagrees, at least as to Shapiro's projection of DirecTV's growth beyond 2002. Since Shapiro used actual data of DirecTV's growth through 2002, any assumptions he made regarding DirecTV's growth in that period are reliable. However, Shapiro did not test his methodology for predicting DirecTV's growth after 2002, and the court is not persuaded by his explanation for his failure to do so. Although the market in Puerto Rico may well have differed from other markets, Shapiro could have specifically laid out the data relating to the growth of satellite services in other markets (which he acknowledged were readily available), and explained why differences in those markets

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[1] WH-TV now has submitted just such a comparison, as an exhibit to its response to Zenith's motion in limine. The comparison was first provided to Zenith in April 2003. Expert discovery between WH-TV and Zenith closed long before April 2003, and therefore the court disregards this exhibit.

would compel different results in Puerto Rico. Instead, Shapiro merely states that data from other markets generally "informed" his opinion, and cites to his experience in the industry. Shapiro has not supported his projection of DirecTV's growth beyond 2002 with a reliable analysis. *See Clark v. Takata Corp.*, 192 F.3d 750, 759 n.5 (7th Cir. 1999) (even "[a] supremely qualified expert cannot waltz into the courtroom and render opinions unless those opinions are based upon some recognized scientific method and are reliable and relevant under the test set forth by the Supreme Court in Daubert.").

Zenith also challenges the reliability of Shapiro's projection of the percentage of DirecTV's projected growth WH-TV would have captured had it not been delayed in launching its digital television service. Shapiro projected that WH-TV would have initially captured 15% of DirecTV's growth during a "transition phase," when DirecTV offered only one local station and WH-TV was just beginning to convert its analog subscribers. He projected that WH-TV then would have captured 30% of DirecTV's growth during a period when WH-TV was actively marketing its service to new subscribers and DirecTV still offered only one local station. Shapiro projected that WH-TV then would have captured 20%, and eventually 10%, of DirecTV's growth, as DirecTV increased its local programming.

Shapiro states that he estimated the extent of WH-TV's market penetration as compared to DirecTV's, by balancing factors such as the number of local stations offered, antenna size, local versus non-local orientation of programming, customer payment procedures, channel capacity, pricing, advertising resources, and local distrust of satellite service as a result of an earlier failure of another satellite provider in Puerto Rico. In his deposition, Shapiro again noted that the

Puerto Rico market was unique, and stated that it would not have been relevant to examine other markets in which the Multipoint Multichannel Digital System ("MMDS") type of service WH-TV offered was competing against satellite service. Shapiro characterized his projected market share numbers as "a forecast based on [his] judgment."

Shapiro did compare his conclusions as to the portion of DirecTV's growth he predicted WH-TV would have captured in 2002, against actual data from a market in Mexico. In that comparison, Shapiro observed that the Mexican market had an MMDS operator with "less compelling service" than WH-TV (the Mexican operator offered analog service), and had more intense competition from both wired cable and satellite providers. The Mexican MMDS operator achieved an 8.6% share of households receiving multi-channel services. Shapiro had forecast that WH-TV would have achieved only 4.3% of Puerto Rico's multi-channel services subscribers in 2002. Based on his comparison with the results from the Mexican market, Shapiro reasoned that his predictions regarding WH-TV were reasonable and conservative.

Shapiro's comparison between the results of the Mexican market and his prediction regarding how much of the Puerto Rican market WH-TV would have captured in 2002 shows that Shapiro's methodology was reliable in his predictions through 2002. However, as with his forecast of DirecTV's growth after 2002, Shapiro does not compare his predictions relating to WH-TV's growth after 2002 with results from any other market. Shapiro again justifies this decision by stating that such a study would not have been useful because there are no comparable markets. However, there apparently are markets in which an MMDS provider competed against a satellite provider, even if those markets differed significantly from the Puerto Rican market at issue here. Shapiro could

have tested his predictions relating to WH-TV from 2002 through 2008 by comparing WH-TV's situation to the manner in which competition between MMDS and satellite providers evolved in other markets, and noting how the differences would affect his conclusions regarding the Puerto Rican market.

The court is unable to determine the methodology that serves as the basis for Shapiro's opinion as to what WH-TV's growth would have been after 2002. Therefore, the court concludes that Shapiro's opinions regarding the percentage of DirecTV's growth WH-TV would have captured after 2002 are not reliable. Shapiro's testimony relating to WH-TV's future lost profits after 2002 is excluded.

II. New Business Rule

The court next turns to the question of whether evidence of future lost profits through 2002 also should be excluded under the new business rule. Under Illinois law, a new business (or an existing business with a new product) cannot recover lost profits. *Kinesoft Dev. Corp. v. Softbank Holdings Inc.*, 139 F. Supp. 2d 869, 908 (N.D. Ill. 2001). The reason for this rule is that a new business cannot show what its profits are with any degree of certainty. *See SK Hand Tool Corp. v. Dresser Indus., Inc.*, 672 N.E.2d 341, 348 (Ill. App. Ct. 1996).

According to Zenith, WH-TV's digital television service was a new product. Zenith observes that WH-TV's digital service required an understanding of different technology than analog service, and used equipment supplied by new vendors. In addition, WH-TV's digital service required substantially more capital than its analog service had required. The digital technology was limited to subscribers with a clear line of sight

between WH-TV's head-end and the subscribers' antenna, affecting the size of the available market and the marketing strategy to be used. Finally, Zenith argues that WH-TV's goal of enrolling many more new subscribers than it had ever had compels the conclusion that WH-TV's digital service was a new business.

WH-TV notes that it had been providing analog television service in the same market in which it intended to offer digital service. According to WH-TV, digital service was merely a superior form of television service, with additional channels and better picture quality, that WH-TV believed would be attractive to new customers in its market. Thus, digital television service was not a new product, but merely an upgrade of the service WH-TV was already providing.

The court agrees with WH-TV. WH-TV began as a television service provider, and continued to provide television service when it implemented its plan to convert to digital service. While there may have been differences between the analog service WH-TV had previously offered and the digital service it subsequently offered, "'different' is not necessarily 'new.'" *See Alper v. Altheimer & Gray*, No. 97 C 1200, 2002 WL 31133287, at *41 (N.D. Ill. Sept. 26, 2002). The court concludes that WH-TV's digital television service was not a new business.

III. Reasonable Foreseeability

Finally, Zenith urges the court to bar Shapiro's testimony on the basis that Shapiro's damages calculation includes damages that Zenith could not have reasonably foreseen. Zenith argues that since WH-TV did not purchase more set-top boxes than it required to convert its existing analog subscribers to digital service (a number that never exceeded

7,400), Zenith could not be expected to foresee that defects in those set-top boxes could cause it to lose profits on set-top boxes for 30,000 subscribers. Zenith also argues that it could not be expected to have foreseen that DirecTV would capture the market and cause WH-TV to permanently lose its competitive position.

WH-TV has presented evidence that when WH-TV requested a proposal from Zenith in August 1998, WH-TV requested a quote for 43,000 set-top boxes, with 15,000 needed the first year and 7,000 per year for the four following years. In September 1998, Zenith responded with a price quote for 60,000 set-top boxes.

The court concludes that WH-TV has presented sufficient evidence to raise a question of fact as to whether Zenith could reasonably have foreseen that the defects in its set-top boxes could cause WH-TV to lose sales to future subscribers. *See Mid-America Tablewares, Inc. v. Mogi Trading Co., Ltd.*, 100 F.3d 1353, 1362 (7th Cir. 1996) (interpreting Wisconsin law) (stating that determination as to whether parties contemplated future profits was issue of fact, and there was no basis to conclude that evidence as to the foreseeability of plaintiff's lost future profits should be excluded as a matter of law); *see also Outboard Marine Corp. v. Babcock Industries, Inc.*, No. 91 C 7247, 1995 WL 296963, at *2 (N.D. Ill. May 12, 1995) (noting that foreseeability is a question that is generally left for the jury to resolve, and that foreseeability should be decided as a matter of law only where the facts demonstrate that the plaintiff could never be entitled to recovery). In addition, especially given that the agreement between Zenith and WH-TV specified delivery times for the set-top boxes, a jury could find that Zenith should have reasonably foreseen that WH-TV would lose its competitive

position if functioning set-top boxes were not delivered on time.

ORDERED: Zenith's Motion in Limine with Respect to the Testimony of Peter Shapiro [447-1] is granted in part and denied in part. The motion is granted as to evidence of WH-TV's future lost profits after 2002, and denied as to evidence of WH-TV's future lost profits through 2002.

ENTER:

/s/_____
George W. Lindberg
Senior U.S. District Judge

DATED: JUN 25 2003

Supreme Court, U.S.
FILED
MAY 25 2005
OFFICE OF THE CLERK

No. 04-1514

In the Supreme Court of the United States

WH-T.V. BROADCASTING CORPORATION,
Petitioner,

v.

ZENITH ELECTRONICS CORPORATION; MOTOROLA, INC.; and GENERAL INSTRUMENT CORPORATION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT ZENITH'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Was the Court of Appeals correct in holding that the district court acted within its discretion in excluding the testimony of plaintiff's damages expert?

STATEMENT IN COMPLIANCE WITH RULE 29.6

LG Electronics, U.S.A., Inc. is the parent corporation of Zenith Electronics Corporation, and owns 10% or more of its stock.

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STATEMENT OF THE CASE

Zenith Electronics Corporation ("Zenith"), plaintiff below and respondent here, supplied set-top boxes to petitioner WHTV, a television broadcaster in Puerto Rico, in connection with WHTV's planned conversion from analog to digital television service. By being the first to offer digital service in Puerto Rico, WHTV hoped to enroll many more subscribers than it had in the past. WHTV's expectations were disappointed, however, when DirecTV, a new satellite competitor, beat WHTV to the market. WHTV's failure to launch its digital service prior to DirecTV's entry in the market was unrelated to the alleged problems with Zenith's set-top box.

Notwithstanding the alleged problems with Zenith's set-top box, WHTV succeeded in converting its analog subscriber base to its new digital service. There was evidence that many of the alleged problems with Zenith's set-top boxes originated in other parts of WHTV's system, and the box was the convenient scapegoat. There was also evidence that none of the alleged problems were of the magnitude that would have prevented WHTV from competing against DirecTV, if it were able. WHTV continued to purchase Zenith's set-top boxes even after modifications were made to WHTV's system that were intended to allow WHTV to purchase set-top boxes from other manufacturers. (WHTV argued that the modifications were not successfully completed, but there was evidence to the contrary. WHTV was also sanctioned on account of its failure to timely disclose its purchases after the completion of such modifications.) Although WHTV kept and used Zenith's set-top boxes, it refused to pay for the final shipment.

Zenith brought suit to recover unpaid balances due on the set-top boxes. WHTV counterclaimed for loss of profits allegedly suffered by reason of alleged defects in the set-top boxes. The profits that WHTV supposedly lost were from future subscribers that it had not yet enrolled. Its projections of future subscribers were not based on WHTV's past experience, since WHTV's enrollment peaked in 1998, and declined by nearly 1,000 subscribers during the last half of 1998, long before the start of its digital service. WHTV did not offer any evidence of damages resulting from a single customer who either terminated or declined service on account of the alleged problems with Zenith's set-top box.

In support of its damages claim, WHTV relied solely on the testimony of its retained expert, Peter Shapiro. App. 3a-4a. To arrive at his lost-profits numbers, Shapiro projected the future growth of DirectTV, and then projected the share of Direct TV's subscriber base that he estimated WHTV could have enrolled had it not been purportedly delayed by the alleged deficiencies in the set-top boxes. App. 4a–5a. In making such estimates Shapiro did not compile data from other markets regarding the growth rate of direct broadcast satellite providers, and he did not rely on the experience of MMDS broadcasters in other markets. App. 4a, 23a-24a and 25a-26a. He simply pointed to a number of "factors" that he considered would influence WHTV's share of the market, assigned arbitrary percentages to each factor, and arrived at precise numbers for WHTV's "market share" for each future year through 2008. App. 24a-26a. On cross-examination Shapiro repeatedly insisted that the sole basis for the numbers he offered was his "judgment," his "experience," or "his curriculum vitae." App. 5a and 26a.

Shapiro did not, as WHTV asserts, base any part of this projection on historical growth rates of direct broadcast satellite providers in the United States and he was barred by the district court from attempting to supplement his opinion with such information, which he tried to do long after the close of discovery. App. 32a, fn. 1. Moreover, Shapiro did not, as WHTV again erroneously asserts, examine six years of data from the Mexican market in arriving at his estimates. Shapiro only looked at data from 2002, not as part of his methodology but only, in his words, as a "cross-check." App. 25a – 26a. As the court of appeals noted, Shapiro "eyeballed but did not analyze" the Mexican data. App. 5a. In any event, Shapiro's 2002 snapshot was meaningless, and no reliable inferences could be drawn therefrom, as the district court concluded. App. 26a.

Shapiro never denied the existence of other markets using the same MMDS technology and industry-standard equipment, as WHTV now asserts for first time after the court of appeal's ruling and in its petition to this Court. See Pet. at 12. When questioned on this topic, Shapiro claimed that such other markets were "irrelevant" since Puerto Rico presented unique market circumstances. App. 5a and 33a-34a.

Shapiro also opined that WHTV's business opportunity was permanently lost, a contention that was disputed by Zenith's experts. To illustrate Shapiro's inflated damage estimate, one of Zenith's experts calculated what WHTV's damages would be if it were found that WHTV's opportunity was only delayed. Using Shapiro's own forecasts and assumptions, Zenith's expert demonstrated that at most WHTV's damages would be a fraction of what was claimed. Far from "accepting" Shapiro's methodologies, as WHTV contends, Zenith's expert used his "method" against him.

The district court, in two successive opinions, concluded that Shapiro's opinion was not reliable within the requirements of Rule 702 of the Federal Rules of Evidence and excluded the proffered testimony. App. 26a – 27a; App. 35a. The court also excluded, on procedural grounds, lay testimony that WHTV belatedly sought to introduce in support of its damages claim. App. 15a – 18a. There being no evidence to support WHTV's damages claim, but having found a breach on Zenith's part because of a failure of the set-top boxes to conform to the contract, the court granted summary judgment for nominal damages on WHTV's counterclaim. WHTV appealed, urging error in the exclusion of the damages evidence. The court of appeals affirmed.

(WHTV had joined as third party counter-defendants Motorola, Inc. and its subsidiary, General Instrument Corporation, successors to Zenith's division that made the set-top boxes. The district court's judgment in favor of Zenith eliminated WHTV's claims against those entities, which are additional respondents in this Court. Motorola and General Instrument have filed a waiver indicating that they do not intend to file a separate brief in opposition to the petition for certiorari.)

REASONS FOR DENYING THE WRIT

A. THE CASE PRESENTS ONLY AN ISSUE OF THE DISTRICT COURT'S DISCRETION IN EXCLUDING EVIDENCE. THAT COURT'S RULING, AND THE COURT OF APPEALS' AFFIRMANCE, WERE CONSISTENT WITH FED.R.EVID. 702 AND THIS COURT'S DECISIONS CONCERNING THE ADMISSIBILITY OF EXPERT TESTIMONY, AND CREATE NO CONFLICT WITH DECISIONS IN OTHER CIRCUITS.

The case does not present the questions posed by petitioner. The court of appeals did not "require" that an expert use any particular analytical method or "condition" the admissibility of expert testimony on the use of methods described in the *Reference Manual on Scientific Evidence*. It held only that review of a trial court's decision under Rule 702 of the Federal Rules of Evidence is deferential, and that the trial judge had not abused his discretion in excluding the proffered testimony of the plaintiff's damages expert. The court of appeals' discussion of regression analysis and the "tool kit of the social sciences" did not state or imply that the expert was required to use any particular method. The availability of recognized methods only made more glaring the inability or unwillingness of WHTV's expert to point to *any* method that he had used in arriving at his estimates of lost profits. As the court of appeals further emphasized, it was the proponent's burden to explain, if possible, why no recognized method could be used, and no such explanation was offered.

The petition for certiorari offers no reason for finding that the district court's ruling was an abuse of discretion. The

district court carefully considered, and reconsidered, and fully explained his reasons for concluding that Shapiro's opinions were not reliable. His conclusion was based squarely on this Court's guidance, as the following statement from the district court's opinion shows:

> As the Supreme Court has observed, "[t]rained experts commonly extrapolate from existing data. But nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert." *General Elec. Co. v. Joiner,* 522 U.S. 136, 146 (1997). Since Shapiro does not explain how he arrived at the percentages he presents in his opinion, the court concludes that "there is simply too great an analytical gap between the data and the opinion proffered." *See id.*

App. 26a-27a. The court of appeals repeated the same passage from this Court's *General Electric* decision, saying that it was a "fair description of Shapiro's proposed testimony." App. 8a.

The petition cites decisions from other circuits in which, petitioner contends, less exacting standards for admission of expert opinions were applied. Pet. 16-17. Without exception, however, the cases cited are ones in which a court of appeals upheld a district court's decision to admit the expert testimony in question. In view of the deference owed to a district court's ruling on the admissibility of evidence, none of the cited court of appeals' decisions conflicts with the decision in this case, and consequently those cases provide no basis for saying that other circuits observe more lenient standards in applying Rule 702 than did the court below. Thus, for

instance, petitioner's very first example is from the Fifth Circuit (see Pet. 16). Yet only days ago the Fifth Circuit upheld a district court's exclusion of an expert's lost profits testimony on grounds closely resembling those in this case. The Fifth Circuit said, "[E]xcluding McCoin's testimony was anything but an abuse of discretion. Indeed, McCoin made no effort to demonstrate the reasonable similarity of the plaintiffs' firms and the businesses whose earnings data he relied on as a benchmark." *El Aguila Food Products, Inc. v. Gruma Corp.*, 2005 WL 1156090, *2 (5th Cir. May 17, 2005).

It would be odd indeed to use this case, in which the district judge's ruling was so clearly within its discretion, as an occasion to retreat from the standards marked out by this Court's decisions in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), *General Electric Co. v. Joiner*, 552 U.S. 136 (1997), and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), even if such a retreat were deemed desirable.

B. THIS COURT'S RULE 10 APPLIES.

The petition should be denied for the further reason that it raises nothing more than a question of the misapplication of a properly stated rule of law. The petition does not question that both the district court and the court of appeals correctly stated the rules of law applicable to the case.

CONCLUSION

The writ of certiorari should be denied.

Respectfully submitted,

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In the Supreme Court of the United States

WH-T.V. BROADCASTING CORPORATION,
Petitioner,

v.

ZENITH ELECTRONICS CORPORATION; MOTOROLA, INC.; and GENERAL INSTRUMENT CORPORATION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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REASONS FOR GRANTING THE WRIT

Zenith's arguments in opposition underscore the need for this Court to grant review. Zenith's characterization of the Seventh Circuit's opinion as merely identifying "the availability of recognized methods" simply adopts, without question, the opinion's fundamental assumption: that regression analysis or other econometric tools are, in fact, the type of "recognized methods" mandated by Fed.R.Evi. 702 and 703 to qualify an expert. Zenith does not and cannot deny that no evidence in the record supports the assumption that these methods represent the minimum standard for intellectual rigor in the field of business valuation. Nor does Zenith deny that the Seventh Circuit articulated a novel standard when it imposed the "negative burden" on proponents of expert testimony to explain why particular methods were not used — even when the record is devoid of any suggestion that those methods can or should be used.

WHTV does not suggest, as Zenith claims, that this Court "retreat" from the standards articulated in *Daubert v. Merrell Down Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), *General Electric Co. v. Joiner*, 552 U.S. 136 (1997), and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999). To the contrary, this case presents a unique opportunity to clarify the proper application of those standards to expert testimony on damages, economics and other social sciences.

Zenith's reference to *El Aguila Food Products, Inc. v. Gruma Corp.*, 2005 WL 1156090, at *2 (5th Cir. May 17, 2005), to contrast WHTV's reliance on *PSC Communications Corp. v. Next Level Communications*, 107 F.3d 322, 329-30 (5th Cir. 1997), underscores the need for such explanation by this Court. If two district courts in the Fifth Circuit have the discretion to either accept or reject nearly identical expert

testimony, the scope of that discretion, as it is currently understood, is so broad as to defy predictability. As Zenith's example shows, no litigant can confidently secure expert damages testimony and reasonably expect that testimony to be admitted because any such testimony could arbitrarily be excluded by the district court and, under Zenith's formulation of the abuse of discretion standard, that exclusion would be essentially unreviewable.

FACTS

The Statement of the Case supplied by Zenith Electronics Corporation ("Zenith") makes several factual assertions that are both irrelevant and incorrect. Most of Zenith's factual contentions are directed to the issue of causation rather than damages and, therefore, are irrelevant to the novel application of Fed. R. Evid. 702 and 703 to expert damages testimony. Zenith's motion for summary judgment directed to the issue of causation was denied by the district court.

Substantial evidence suggested that the set-top boxes were fundamentally flawed. In a document written while employed by Motorola/GI, one former Zenith engineer explained the fundamental problem with the Z12C model set-top box:

> It is important to understand the current state of the Z12C platform so reasonable expectations can be set. The Z12C software state, is unfortunately, a product of poor software engineering. Consequently, it is a high maintenance code that's riddled with bugs (both documented and not) and kludges. A Kludge is defined as:
>
> > ... an awkward or clumsy (but at least temporarily effective) solution to a

> programming or hardware design or implementation problem. It originates because another, more elegant or appropriate solution is not currently possible ....
>
> The amount of Kludge in the Z12C code is to the point where it's impractical to extend and costly to rectify.

As another former Zenith engineer stated in an informal e-mail exchange: "This is absolutely scary. I can not believe [Zenith engineers] can write such crappy code ... No wonder WHTV wants to sue us. I can't really blame them ... Totally unacceptable code quality." This "totally unacceptable code" caused the set-top boxes to, among other things, re-boot by themselves, lock up when changing channels, fail to respond to the remote control, freeze the video display or suddenly lose video display altogether.

Contrary to Zenith's claim, WHTV reasonably expected to grow its subscriber base by introducing digital, wireless service before or at the same time as DirecTV Latin America. WHTV projected modest growth after digital conversion, increasing its market share from 2% in 1999 to 4.6% by 2002. By August 1999, WHTV had completed installation of the digital transmission equipment and received the first 1,000 STBs. Had the STBs operated "seamlessly" with WHTV's transmission equipment — as Zenith had expressly warranted — WHTV could have launched within days of DirecTV's July 29th entry into Puerto Rico.

Zenith substantively misrepresents Shapiro's opinion, methods, factual foundation and proposed testimony and Zenith's various citations to the Appendix to WHTV's Petition do not support its mischaracterizations. Although Zenith's expert did not agree that WHTV's market

opportunity was permanently lost, no evidence suggests he believed Shapiro's methodology was inconsistent with professional standards or lacked the appropriate level of intellectual rigor. Indeed, Zenith's expert adopted Shapiro's forecast of subscriber growth without reservation into Zenith's own damages model, stating that he "accepts Shapiro's Revised Case subscriber growth ... rate assumptions because these subscriber growth rates are corroborated by management's contemporaneous expectations of the business, prior to realization of any alleged problems with the Zenith STBs."

CONCLUSION

For the reasons stated, certiorari should be granted to review and ultimately reverse the decision below.

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